APPEAL NO. 92159

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1992). On March 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. He found that neither (appellant), appellant herein, nor (AA), a claimant below, were legal beneficiaries and ordered the carrier, respondent herein, to pay death benefits to the Subsequent Injury Fund. Appellant asserts that findings and conclusions that stated she abandoned deceased were in error because evidence of record did not meet requirements of case law to find "abandonment."

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

The deceased was 25 years old and worked for (employer) on August 24, 1991. He was in the back of a small truck picking up construction signs when the truck started forward and he fell out of it hitting the back of his head on the roadway. The respondent did not contest compensability but questioned to whom death benefits were owed. At the time of death, deceased's mother and father had predeceased him. He had formally married (Ms. DB) (Hann) on June 4, 1988. They had no children, natural or adopted, and cared for no children. They never divorced.

After the marriage of deceased to appellant, appellant testified that the couple lived approximately six months near (city), Texas, and then "split up" with appellant moving in with her parents. After some period, described as less than a year, (appellant is vague about dates in her testimony) appellant joined deceased in (city), Texas, where they lived with his aunt and then lived in a mobile home. Appellant said she stayed in (city) for three to five months and then, because of financial problems, they again split up and deceased drove her back to (city) to live with her parents. She characterized this split up as occurring in 1990 and later stated that the deceased subsequently returned to (city) in the first part of 1990. She acknowledged that she took all her personal belongings when she left (city) and did not move back in with deceased at any time after he returned to (city) from (city). At some unknown time after leaving (city), appellant moved in with BW as a roommate. She admitted to having sexual relations on one occasion with BW but denied any marriage plans with him. She also stated that she and deceased had sexual relations "off and on" while separated after she left (city).

(MB), a cousin of appellant, stated that she thought appellant had been lonesome in (city) so she returned to (city). She also acknowledged having heard that Ms. D would marry BW, but when she asked appellant about that was told that was not true.

(AA) testified that she was divorced when she met deceased on March 25, 1989, and they started living together one week later. They lived together in (city) until his death. After living with assorted relatives, AA and deceased applied for an apartment together in

February 1991, which is corroborated by an application for an apartment in evidence as Carrier #2. AA further stated that she and deceased went to an attorney in 1989 to see about a divorce by deceased from appellant, but were told by that attorney that he already had been seen by appellant about securing the divorce. AA said they did not follow up on the question of divorce because they could not afford to get married. She considered herself to be married to deceased but acknowledged that they had not formally married. She did not go by the name (Ms. B). She said that she and deceased had no children but he helped care for her children by a previous marriage. The record appears to indicate that she is not claiming on behalf of her children, but only filed a claim as spouse. AA added that deceased did not contribute to the support of appellant after they began to live together. She also stated that appellant told her on the telephone that she (AA) and deceased were invited to appellant's wedding to BW. AA did not appeal the decision of the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92100 (Docket No. HO-00104-CC-1) decided April 17, 1992, to the effect that a marriage is void if either party's prior marriage has not been dissolved.

Points raised in documents admitted into evidence also included that deceased on June 27, 1990, checked marital status as "single" on Internal Revenue Service Form W-4, and appellant in a recorded telephone statement said she had not lived with deceased since February 1990.

Appellant specifically takes issue with Findings of Fact Nos. 10 and 14 of the hearing officer. They read as follows:

10.(Appellant) and (BW) had sexual relations and intended to marry each other sometime after February, 1990.

14.(Appellant) abandoned deceased in February, 1990 without good cause which was more than one year immediately preceding the death of deceased.

The thrust of appellant's argument on appeal is that statutory provisions in the 1989 Act that address beneficiaries of death benefits (Article 8308-4.42(g)(1) are not materially different than those found previously in TEX. REV. CIV. STAT. ANN. art. 8306 § 8a (repealed 1989) (hereafter called old law). The key provision asserted involves the term "abandoned," and appellant cites Jackson v. Jackson, 470 S.W.2d 276 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.) and Liberty Mutual Ins Co v. Woody, 640 S.W.2d 718 (Tex. App.-Houston [1st Dist] 1982, no writ) as controlling. These cases say that for abandonment to occur the abandoning spouse must have left with the intent not to return to live with the other as man and wife. Both also said that if the remaining spouse requested the other to leave, or if one left by mutual agreement, or if one left with the consent of the other, there would be no abandonment. Appellant contended that under the criteria of these cases, there could be no finding of abandonment.

Jackson v. Jackson, *supra*, made it clear that divorce law then in effect was reviewed

in regard to criteria for "abandonment", and that court said that the same conduct as was required by divorce law to constitute abandonment was also required by article 8306 § 8a of old law. More important than previous ties of the worker's compensation law to divorce law, Article 8308-4.42 of the 1989 Act has been interpreted by a commission rule that addresses abandonment. Article 8308-4.42(g)(1) reads:

> "Eligible spouse" means the surviving spouse of the deceased employee unless the spouse abandoned the employee for more than one year immediately preceding the death without good cause, as determined by the commission.

Tex. W. C. Comm'n, 28 Tex Admin Code §132.3 (Rule 132.3) became effective on January 1, 1991, and reads in part:

> (a)The surviving spouse is entitled to receive death benefits, unless subsection (b) of the section applies.
>
> (b)A surviving spouse who abandoned the employee, without good cause for more than one year immediately preceding the death, shall be ineligible to receive death benefits. The surviving spouse shall be deemed to have abandoned the employee if the surviving spouse and the employee had not been living in the same household for more than one year preceding the employee's death unless the spouse is:
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> (1)hospitalized;
>
> (2)in a nursing home; or
>
> (3)living apart due to career choices, military duty, or other reasons where it is established their separation is not due to the pending break-up of the marriage. The burden is on a person who opposes the claim of a surviving spouse to prove the spouse abandoned the deceased employee.

Neither of the two cases cited by appellant, Jackson and Woody, *supra*, refer to any applicable rule interpreting article 8306 §8a of old law. In addition a search of commission rules applicable to old law found no rule applicable to the definition of or criteria for "abandonment." In contrast, the 1989 Act is materially different from old law because it has been interpreted substantively in this area as can be seen by rule 132.3, *supra*. A valid administrative rule is ordinarily construed like a statute and has the force and effect of legislation. City of Lubbock v. Public Utility Comm. of Texas, 705 S.W.2d 329 (Tex. App.-Austin 1986, writ ref'd n.r.e.) *See also* Sears v. Texas State Board of Dental Examiners, 759 S.W.2d 748 (Tex. App.-Austin 1988, no writ) and Southwest Airlines v. Bullock, 784 S.W.2d 563 (Tex. App.-Austin 1990, no writ). Administrative regulations are presumed to

be valid with the burden on the challenger to show that they are invalid. Bower v. Edwards County Appraisal District, 752 S.W.2d 629 (Tex. App.-San Antonio 1988, writ denied). Under Rule 132.3, questions of consent, agreement, etc. called for in the cases cited by appellant as being contradictory to a state of abandonment have been replaced by hospitalization, nursing home care, and reasons showing that the separation is not due to the pending break-up of the marriage. Rule 132.3, applied to the evidence of record, provides sufficient support for the hearing officer's finding that appellant abandoned deceased for over one year immediately before the death. Appellant herself placed the separation at over one year; the testimony of AA placed it at over two years. The separation occurred while appellant and deceased both continued to live in the same locale. There was no testimony or other evidence that appellant left deceased because of a career choice. While appellant referred to the possibility that she and deceased might have returned to each other, there was sufficient evidence in documents deceased had signed, in AA's testimony, and even in the testimony of appellant to conclude that separation was due to a pending break-up in the marriage. While never at issue, we note that there was no evidence of either hospitalization or nursing home care involved. There also was sufficient evidence to support the hearing officer's finding as to sexual relations and intent to marry on the part of appellant and BW in the testimony of appellant and AA.

The conclusions of law complained of by appellant address the determination of abandonment and the decision that the Subsequent Injury Fund is the beneficiary. Both conclusions are sufficiently supported by findings of fact discussed herein and other findings not asserted to be in error. The decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly unjust and wrong. Twin City Fire Ins. Co. v. Grimes, 724 S.W.2d 956 (Tex. App.-Tyler 1987, writ ref'd n.r.e.).

We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge